No. 87-154

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

JOSHUA DeSHANEY, a Minor, by his Guardian ad Litem, and MELODY DeSHANEY,

Petitioners,

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES; WINNEBAGO COUNTY; ANN KEMMETER and CHERYL STELSE,

Respondents.

Brief of the States of New York, Connecticut, Maryland, Oregon, Pennsylvania and Wisconsin as *Amici Curiae* in Support of Respondents

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Brief of the States of New York, Connecticut, Maryland, Oregon, Pennsylvania and Wisconsin as *Amici Curiae* in Support of Respondents

Interest of *Amici Curiae*

Amicus State of New York and the other *amici* States respectfully submit this brief pursuant to Supreme Court Rule 36.4 in support of respondents. The *amici* urge this Court to affirm the judgment of the court below.

The *amicus* State of New York indirectly funds a significant portion of the child protective caseworker activity in

New York State. While many of these caseworkers are county employees, State revenue sharing assists in the provision of these services. Additionally, the State, through its Department of Social Services, provides training and continuing education for caseworkers. The State plays an indirect role in the quality of care furnished by the caseworkers by distribution of a Child Protective Services Program Manual. This Manual, which reprints relevant statutes, regulations and forms for court proceedings, also enumerates guidelines and procedures for child protective caseworkers. The Manual suggests methods of investigating and documenting suspected incidents of child abuse and maltreatment so that available evidence can be presented in usable form to prosecutors and courts. The State Department of Social Services also maintains a computerized, centralized register of child abuse allegations and provides this information to local caseworkers and courts. In sum, the State is significantly involved in overseeing the provision of child care protective services, even though local government employees generally are responsible for actual delivery of these services in the field.

While the details of the programs and statutes vary from state to state, the description of New York's child care protective services system is generally similar to those in the other *amici* states.

Thus, *amici* have a financial, a professional and an operational interest in this case which involves potential "constitutional tort" liability of child protective caseworkers and their supervisors. Therefore, this brief expresses the concerns of *amici's* child protective caseworkers, as well as the interests of state and local government agencies.

The *amici* submit that child protective officials, such as caseworkers and their supervisors, should not be exposed to money damages liability under 42 USC § 1983 (and, derivatively, to attorneys' fee awards under 42 USC § 1988), when, as here, the caseworkers do not themselves have physical custody of a child subsequently abused by a parent in lawful custody of the child. Regardless of how characterized, omissions of child protective caseworkers to take action to upset the strong presumption of parental custody of children should not be actionable under 42 USC § 1983 as a violation of the due process clause of the Fourteenth Amendment.

The *amici* recognize the unfortunate tragedy that was inflicted by an abusive parent upon the infant petitioner in this case. Yet, in this and similar cases, governmental providers of supportive social services are limited—by constitutional constraints, by statutory provisions, by court decisions on burdens of proof as to custody of children and termination of parental rights, by heavy caseloads, and by availability of staff and resources—from taking action in every case which, in hindsight, might have prevented injury if parental rights were challenged, contested or deprived. More importantly, child protective caseworkers, despite the best of motivation and training, are unable reliably to predict whether parents will abuse children.

Therefore, *amici* respectfully submit this brief to articulate the problems and concerns of the child protective caseworkers and supervisors whose ability to discharge their professional responsibilities is threatened by petitioners' lawsuit now before this Court.

Summary of Argument

While the court below properly affirmed the dismissal of the complaint, it did so on the basis that the due process clause does not furnish a "constitutional tort" remedy against *non-custodial* governmental actors, even for errors or omissions claimed to involve gross negligence, deliberate indifference, or willful and wanton misconduct. We agree with that result, but we first discuss another sound and simple reason why liability could not exist in *this* case. In our view, regardless of whether petitioner's allegations might otherwise state a cause of action, they are nonetheless an insufficient predicate for liability, as absolute immunity should insulate child protective caseworkers and their supervisors from liability.

In many respects, the job of a child protective caseworker resembles that of a prosecutor or parole officer. Each performs a quasi-judicial task of measuring facts and circumstances against a set of general criteria (*e.g.*, constitutional, statutory and regulatory). Each must decide whether evidence, often circumstantial, is sufficient to justify formal charges. Each must be mindful of the burdens of proof the courts interpose. Each must temper judgmental, discretionary decisions with the practical consequences that time and effort devoted to presenting or prosecuting unsustainable charges will divert resources from other cases and other responsibilities. Yet, because none of these officers are able reliably to predict future human behavior, none of them are or should be subject to federally imposed liability for the performance of their quasi-judicial tasks. All the more so should child protective caseworkers not be exposed to damages liability under 42 USC § 1983 because of the overwhelming constitutional, statutory and regulatory presumptions in favor of parental custody and decisionmaking authority.

Moreover, a rule of liability for social services caseworkers would place them in the untenable situation of being sued for either doing too much or too little; in the former case by parents deprived of custody even temporarily, under an aggressive policy of initiating child protective proceedings; in the latter case by children like petitioner.

Alternatively, and apart from questions of quasi-judicial absolute immunity, the failure adequately to furnish child protective services in a non-custodial context, simply is not actionable under the due process clause. Cases involving direct institutional custody, such as mental health facilities and/or prisons, are readily distinguishable. A non-custodial situation, with periodic visits or investigations of allegations of child abuse, simply lacks both the actual control, as well as the theoretical opportunity for control, which is central to the finding of liability in institutional settings of prisons or mental hygiene facilities.

More generally, as the court below recognized, governmental services which seek to monitor, supervise or regulate conduct of *third parties* cannot guarantee safety. Government may assist in the enhancement of relative safety of others, but the due process clause does not furnish a constitutional guarantee of safety from harm. There is no element of governmental "abuse of power" in this type of case, which, at most, involves a failure to furnish more or better protection from harm inflicted by third parties.

There are also other institutional concerns which counsel restraint before a broad avenue of new liability should be recognized. It will almost always be possible to state a cause of action on the pleadings if gross negligence or recklessness were deemed actionable, because almost any

error or omission can be characterized in those terms. It will almost always be possible to allege that the government, by its inaction, failed to prevent a harm perpetrated by a third party. Government, which merely provides services, will be set up as a guarantor of safety. The federalization of tort law, even in the present context, will invite a flood of new federal lawsuits across the spectrum of garden-variety personal injury actions. Moreover, the prospect of an award of attorneys' fees pursuant to 42 USC § 1988 offers a strong incentive to litigate these claims in federal court.

In short, the consequences of federalizing tort law are profound indeed. The sympathetic facts of this case cannot be denied, but sympathy should not substitute for law, especially when, as here, to do so would be to open a Pandora's Box of liability.

The judgment of the court below should be affirmed.

ARGUMENT

POINT I

This case may be decided, and the judgment below affirmed, on the narrow ground that social services caseworkers (and their supervisors) perform classic quasi-judicial tasks, and hence, are protected by absolute immunity from money damages liability.

While we believe the court below properly decided that allegations of gross negligence, aggravated misconduct, deliberate indifference or egregious misconduct in the failure to provide adequate governmental services were not actionable as a violation of due process, that question need not be answered in this case. We believe that the

judgment below can—and we suggest, should—be affirmed on an equally sound, albeit more limited ground that child protective caseworkers (and their supervisors) perform prosecutorial quasi-judicial tasks, as to which a rule of absolute immunity[1] precludes money damages liability.[2]

This Court has long held that common law immunity principles apply with equal force and effect in 42 USC § 1983 actions involving claims of constitutional deprivations. *Imbler v Pachtman*, 424 US 409, 424-426 (1976) (prosecutors); *Stump v Sparkman*, 435 US 349, 356-357 (1978) (judges); *Briscoe v LaHue*, 460 US 325, 329-336 (1983) (witnesses). In each of these cases, this Court has examined common law immunities and fashioned a rule of section 1983 damages immunity comparable to the

[1]This Court can address the immunity issue, even though it was not addressed below, for several reasons. First, in comparable circumstances, this Court granted certiorari on the broader question of whether negligent interference with an inmate's outgoing mail was actionable, but decided the case on the narrower ground of qualified immunity. *Procunier v Navarette*, 434 US 555, 559-560 & n 6 (1978). Second, the question of whether immunity defeats an otherwise actionable claim is reachable as a question incidental to those framed in the certiorari petition. *See*, Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed 1986), § 6.26. Third, the issue may be reached under the "mere enlargement" rule by which issues treated below may be expanded in this Court to encompass logically connected matters. *See Dewey v Des Moines*, 173 US 193, 198 (1899); *Illinois v Gates*, 462 US 213, 248 (1983) (White, J., concurring) (as to defenses to federal claims).

[2]This case does not appear to implicate any *genuine* issues of municipal "policy", as that term of art is discussed in the cases. *See City of St. Louis v Praprotnik*, ____ US ____, 108 S Ct 915 (1988); *Oklahoma City v Tuttle*, 471 US 808 (1985); *Pembaur v Cincinnati*, 475 US 469 (1986). Because none of the allegations in the complaint implicate any "policy" of the two municipal entity defendants, the judgment as to them should be affirmed for failure to state a cause of action. *See, Baez v Hennessy*, ____ F2d ____, No. 87-7834 (2d Cir July 27, 1988), slip opn at 5069-5074 & n 2. Accordingly, this *amicus* brief focuses on the theory of liability directed at caseworkers and their supervisors.

common law rule. With respect to absolute immunity this Court has consistently held that it is the nature of the governmental actor's *function*, not the employment title, which is the dispositive inquiry. *Butz v Economou*, 438 US 478, 515 (1978); *Imbler*, 424 US at 424-425.

Applying the common law standards which define the tasks of quasi-judicial officers, the work of child protective caseworkers and their supervisors is entitled to absolute immunity. Prosecutors and administrative agency employees performing similar tasks receive absolute immunity for several reasons. In the nature of things, errors can occur because decisions must be made, yet the facts before the decisionmaker may be tentative, sharply conflicting, or incomplete. Prosecutors and their administrative law counterparts need breathing space so they may make independent, reasoned decisions without fear of liability. *See Butz*, 438 US at 512-513. The same rationale has been held to apply to parole officers who make decisions in the field with respect to supervision and/or whether to initiate parole revocation proceedings. *Sellars v Procunier*, 641 F2d 1295, 1299-1300, 1301-1303 (9th Cir), *cert. denied*, 454 US 1102 (1981); *Evans v Dillahunty*, 711 F2d 828 (8th Cir 1983); *Pate v Alabama Board of Pardons and Paroles*, 409 F Supp 478, 479 (MD Ala 1976), *affd no opn*, 548 F2d 354 (5th Cir 1977); *Tarter v State of New York*, 68 NY2d 511, 510 NYS2d 528, 503 NE2d 84 (1986); *Nelson v Missouri Osteopathic Foundation*, 626 F Supp 604, 607 n 2 (WD Mo 1985); *see also, Hendricks v State of Oregon*, 67 Or App 453, 678 P2d 759, *lv denied*, 297 Or 228, 683 P2d 91 (1984) (same result on rationale of "discretionary function" exception to tort liability); *C.L. v Olson*, 143 Wis 2d 701, 422 NW2d 614 (1988) (same result on rationale of "public officer" immunity).[3]

[3]Moreover, as in the case of parole boards (which did not exist in the Civil War era when the predecessor to section 1983 was enacted), the courts will have to reason by analogy to decide the immunity questions, since child protective services caseworkers were not an organized profession at the time following the Civil War. *See Butz*, 438 US at 512-517; *Sellars*, 641 F2d at 1298-1299 & n 6.

The rationale which furnishes absolute immunity for prosecutors and parole officers applies with equal force to child protective caseworkers, because the same type of judgmental, deliberative decisionmaking is involved. There is no functional difference between the decisionmaking process of child protective caseworkers, parole officers and administrative agency prosecutors: each measures facts, including tentatively-determined facts, against generalized criteria (*e.g.*, constitutional, statutory and regulatory provisions) to decide whether or what sanctions, penalties or proceedings to initiate, adjudicate or terminate. Each must necessarily make inherently subjective appraisals of the credibility and reliability of witnesses and suspects. Each is equally capable of coming to the wrong conclusion in a particular case, because of flawed information, mistake in judgment or other error.

Applying the teachings of this Court that the *function* of the decisionmaker is the dispositive factor (*Butz*, 438 US at 513; *Imbler*, 424 US at 424), the majority of courts to consider the question have held that child protective caseworkers (and their supervisors) are entitled to absolute immunity from money damages liability. *Walden v Wishengrad*, 573 F Supp 1115, 1116-1117 (WDNY 1983), *affd*, 745 F2d 149, 151-153 (2d Cir 1984) (absolute immunity on analogy to prosecutorial immunity); *Whelehan v County of Monroe*, 558 F Supp 1093, 1098-1099 (WDNY 1983) (same); *Hennessey v State of Washington, Dept. of Social and Health Services*, 627 F Supp 137, 140 (ED Wa 1985) (same); *In re Scott County Master Docket*, 672 F Supp 1152, 1171 n 5 (D Minn 1987) (citing list of cases); *see also, Midamerica Trust Co. v Moffatt*, 158 Ill App 3d 372, 511 NE2d 964, 110 Ill Dec 787 (Ill App 1987) (public officer immunity precluded suit); *but see, Doe v County of Suffolk*, 494 F Supp 179, 181-182 (EDNY 1980) (caseworker entitled only to qualified immunity on analogy to police officer). Some of the considerations recognized as

justifications for absolute immunity for these caseworkers include the fact that, like prosecutors, these professionals must act under serious constraints of time and information (*Whelehan,* 558 F Supp at 1098); that the threat of liability will shade decisionmaking (*Hennessey,* 627 F Supp at 140; *Whelehan,* 558 F Supp at 1099); and that—because of the potential for many colorable claims—a standard of only qualified immunity would not adequately protect caseworkers (*Walden,* 745 F2d at 152; *Whelehan,* 558 F Supp at 1099). We agree with the reasoning in these cases and urge this Court to follow them and to adopt a rule of absolute immunity for child protective caseworkers and their supervisors.

Neither prosecutors, administrative agency prosecutors, parole officers nor child protective caseworkers are, or should be, exposed to money damages liability. Only absolute immunity affords these decisionmakers the breathing space necessary to perform their often difficult tasks free of harassment or intimidation. *Butz,* 438 US at 512-513; *Imbler,* 424 US at 422; *Walden,* 745 F2d at 151-153. Without absolute immunity, these decisionmakers will inevitably be hesitant to act decisively, particularly in difficult cases. *Butz,* 438 US at 512-513; *Imbler,* 424 US at 422-423.

For purposes of applying absolute immunity for these prosecutorial functions, it makes no difference that the decisionmaker made an error of fact, law, or judgment: absolute immunity bars all such suits. Prosser & Keeton, *Law of Torts* (5th ed 1984), § 132, p 1058. Rather, it is the nature of the *function* that is dispositive of the immunity question. *Imbler,* 424 US at 424-426.

Therefore, purely on the basis of the nature of the decisionmaker's functions, child protective caseworkers (and

their supervisors) should be entitled to absolute immunity from money damages. The judgment below should be affirmed on that basis.

POINT II

Due process is not implicated by alleged shortcomings in supervisory and monitoring services of child protective caseworkers, at least where no custodial "control" over children is involved.

A. The Custodial Cases are not Controlling

Petitioner and *amici* in support of petitioner rely heavily upon cases recognizing some due process protections against the risk of injury in a custodial context within an institution. Those cases are inapposite. There is no occasion in this case for this Court to address the scope of the due process clause in the context of such custodial situations. This Court has already addressed some of the issues in an institutional setting where residents (inmates or patients) receive care, treatment or habilitation under a roof owned by a governmental entity, and under the direct—and virtually constant—supervision of governmental employees. In those limited settings, which are not factually comparable to the case at bar, this Court has held some measure of liability exists for the protection of inmates or mental patients from harm inflicted by other residents or staff. *See Estelle v Gamble,* 429 US 97, 101-108 (1976); *Youngberg v Romeo,* 457 US 307, 314-325 (1982); *compare, Whitley v Albers,* 475 US 312 (1986) (shooting of prisoner during quelling of riot did not violate ban on cruel and unusual punishment or substantive due process absent proof of unnecessary and wanton infliction of pain).

The institutional cases stand on an entirely different footing from non-custodial situations. Because non-custodial situations neither offer the same access to information on the existence of hazards to others, nor the opportunity constantly to monitor the source of the potential harm, there is no comparable ability of governmental decisionmakers to take swift and decisive action to avert threatened harm. In an institutional setting, supervisors can more readily place potential aggressors or victims in separate housing. Furthermore, such an institution by its nature is staffed around the clock. Moreover, privacy rights of prisoners and mental patients, while they exist to some degree (*Hudson v Palmer*, 468 US 517, 521, 524 [1984]; *Youngberg*, 457 US at 315-316, 324), are considerably less of a barrier to oversight and monitoring than the parental rights in the social worker setting. Simple devices like locks on doors and TV cameras work reasonably effectively when the governmental actor owns and operates the premises; considerations of privacy, constitutional and otherwise, positively preclude such prophylactic devices in the context of governmental oversight of third parties, such as the parents of the infant petitioner.

Thus, precedents fashioning limited liability in an institutional context simply cannot form the basis for liability in the social services caseworker context. Therefore, despite the reliance by petitioner on *Youngberg* and *Estelle*, those cases do not justify the expansion of liability in these circumstances.

B. Special Factors in the Family Law Area

Whatever may be said of custodial situations, insofar as a custodial element of "control" is a factor favoring possible liability, the present case lacks even a semblance of such control. Moreover, here, there is an additional—

and compelling—countervailing consideration which counsels strongly against the recognition of any liability: the required deference to parental decisionmaking. This Court has consistently required the States to presume the right of a parent to the custody of his or her child; to prove unsuitability as a parent by clear and convincing evidence; and to defer, to a very large degree, to parental decisions about the proper upbringing of a child. *See, e.g., Santosky v Kramer*, 455 US 745, 764 (1982) (burden of proof to terminate parental rights is the high "clear and convincing evidence" standard); *Wisconsin v Yoder*, 406 US 205 (1972) (right of Amish parents to keep their children out of public school after the eighth grade); *Stanley v Illinois*, 405 US 645 (1972) (invalidating statute that conclusively presumed that unwed fathers were unfit parents and thus incompetent to raise children); *Parham v J.R.*, 442 US 584, 603 (1979) (state may voluntarily place child in mental institution at parent's request, with only informal procedures, without the necessity of adversarial proceedings with representation for the child). Collectively these and other well-established decisions limit the ability of child protective caseworkers to take decisive action in every case which hindsight shows action may have been warranted. *See Matter of Marie B.*, 62 NY2d 352, 477 NYS2d 87, 465 NE2d 807 (1984) (adjournment in contemplation of dismissal ["ACD"] of child neglect proceedings could not constitutionally be equated with unfitness of parent, even when parent voluntarily consented to ACD and indisputably violated the terms of the ACD); *In re Enis*, 121 Ill 2d 124, 520 NE2d 362, 117 Ill Dec 201 (1988) (statute authorizing termination of parental rights merely upon actual proof of physical abuse by a preponderance of evidence did not comport with due process protections for parental rights).

The cases which provide constitutional protections in favor of parental rights and parental custody demonstrate that there is no simple, automatic remedy for child protective caseworkers to employ any time there is a suspicion—or even equivocal evidence—of child abuse. Because of the procedural and substantive protections in favor of parents, child protective caseworkers must be realistic in their assessments of what type of evidence will be deemed by courts as sufficient to sustain allegations of child abuse. Moreover, it is highly doubtful that even the best-educated and properly-motivated social services caseworkers would accurately predict future parental abuse of children. The prediction of future human behavior is too inexact a science for a meaningful, workable standard of care to be articulated, much less to be applied in each case. Tyrell, *Prediction of Dangerousness*, Vol. 34, No. 1, Medical Trial Quarterly 24, 31-37 (1987) (citing extensive professional studies of the problem in the psychiatric field); *see also*, Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U Pa L Rev 75, 84 (1968).[4] Thus, it is inappropriate to impose federalized tort liability in these circumstances.

Other practical factors demonstrate that the imposition of liability against caseworkers and their supervisors would be unfair. The caseloads are staggering. To cite New York as an example, there are only about 2,000 child protective services caseworkers. Not counting existing

[4]Before courts fashion new liabilities, it is appropriate to consider whether a workable standard of care exists. For example, because it is generally agreed that no consensus exists in the educational field on the appropriate way to educate children, the courts have uniformly rejected the tort of educational malpractice. *Torres v Little Flower Children's Services*, 64 NY2d 119, 485 NYS2d 15, 474 NE2d 223 (1984), *cert. denied*, 474 US 864 (1985); *Peter W. v San Francisco Unified School Dist.*, 60 Cal App 3d 814, 131 Cal Rptr 854 (1976); *Tubell v Dade County Public Schools*, 419 So 2d 388 (Fla App 1982); *Hunter v Bd of Ed*, 292 Md 481, 439 A2d 582 (1981).

open files, the numbers of new "reports" of child abuse or maltreatment have steadily increased. There were 95,626 such complaints or reports in 1986; 105,059 in 1987; and 63,608 for the first six months of 1988. Each caseworker inevitably must make judgments about which parents are more likely to abuse their children. But, given the inability to predict future human behavior, as well as the strong presumptions in favor of parental custody and parental decisionmaking, it is simply unfair to burden social services professionals with liability for the regrettable episodes of child abuse that are not prevented.

C. Prior Precedents Do Not Support Liability And, In Fact, Demonstrate That No Liability Should Exist Here.

A review of the leading "constitutional tort" cases demonstrates that, with the possible limited exception of the prison and mental health direct custody cases (*supra*, subpoint "A", pp 11-12), the only due process theory of liability ever accepted by this Court as a justification for awarding damages has been abuse of governmental power. The cases sustaining liability have involved the use of physical force by a governmental actor against a citizen, or the use of a weapon, or some other instrumentality. Yet, in every case in which liability was upheld (either on the pleadings or after verdict), the central element of abuse of governmental authority was present. *See e.g., Home Tel. & Tel. Co. v Los Angeles*, 227 US 278, 287 (1913) (classic statement that abuse of governmental power is the central inquiry under the Fourteenth Amendment); *Monroe v Pape*, 365 US 167, 172 (1961) (police barged into home in the middle of the night, without a warrant, and forced the residents to stand naked while the officers ransacked the house); *Tennessee v Garner*, 471 US 1, 7-21 (1985) (police officer fatally shot unarmed suspect fleeing from a burglary location) (damages liability

justified under the Fourth Amendment); *see also, Screws v United States,* 325 US 91 (1945) (it is a violation of the criminal law counterpart to 42 USC § 1983 for police to beat a prisoner to death); *Johnson v Glick,* 481 F2d 1028, 1033 (2d Cir) (Friendly, J.), *cert. denied sub nom. John v Johnson,* 414 US 1033 (1973) (articulating oft-cited test of justifications for and measurement of the use of force in action by pretrial detainee against police). These cases represent proper and necessary constitutional limitations on the affirmative use of governmental power against individuals. The abuse of power rationale operates as a meaningful deterrent against ill-motivated or overly-exuberant governmental actors. The substantive due process principles governing those cases are not implicated here.

But recognition of the historic limitations which due process imposes to prevent governmental abuse of power, does not imply that liability should be imposed on the basis of an omission to furnish more or better affirmative services. There is a fundamental and dispositive distinction between these two types of cases. These distinctions are ably described in Judge Posner's opinion in the case at bar, *DeShaney v Winnebago County,* 812 F2d 298, 301-304 (7th Cir 1987), and in the other lower court decisions cited at page 301. *See also,* Currie, *Positive and Negative Constitutional Rights,* 53 U Chi L Rev 864 (1986); *McClary v O'Hare,* 786 F2d 83, 88-89 (2d Cir 1986) (action for wrongful death could not be maintained as federal civil rights claim, where the event was an accident, neither the occurrence of which nor the particular victim of which could have been predicted); *Walker v Rowe,* 791 F2d 507, 509-512 (7th Cir), *cert. denied,* 107 S Ct 597 (1986) (due process does not require a state to provide its employees with safe working conditions or to protect them from murderers).

Petitioner and *amicus* on his behalf place considerable, but misplaced, reliance on the common law precept of "special relationships". Citing the Third Circuit decision in *Estate of Bailey by Oare v County of York,* 768 F2d 503 (3d Cir 1985), petitioners equate knowledge of potential risk with a constitutional duty to prevent the harm. That theory simply has no place in the due process jurisprudence. The better view is that due process does not embrace a governmental obligation, to be honored at the peril of constitutional tort damages, to protect citizens from crime. Judge Posner's thoughtful opinion for the Seventh Circuit in this case explains that due process is not a mandate for the government to provide services to its citizens; rather, it is generally viewed as a limitation against arbitrary or abusive exercises of governmental power. *DeShaney,* 812 F2d at 303-304. Other lower courts that have addressed this or related concerns have similarly concluded that state tort remedies, not section 1983 lawsuits, are the appropriate remedy for injured persons. *See, e.g., Harpole v Arkansas Dept. of Human Services,* 820 F2d 923, 928 (8th Cir 1987) (governmental social services caseworker who misjudged ability and fitness of parent to care for child with physical ailments was not liable to grandparent on special relationship theory); *Wells v Walker,* 671 F Supp 624, 626-627 (ED Ark 1987) (person injured by parolee); *Jones v Phyfer,* 761 F2d 642 (11th Cir 1985) (person injured by furloughed prisoner); *see also, Daniels v Williams,* 474 US 327, 335-336 (1986) (alternative holding or dictum which rejects the common-law "special relationship" test of Restatement, Second, of Torts § 314, as a basis for a constitutional tort under the due process clause).

In any event, the purported constitutional tort theory advanced by petitioner should be rejected for the further reason that it would extend liability even beyond common

law bounds. Section 319 of the Restatement, Second, of Torts permits a court to find a "special relationship" only if real—rather than conjectural and indirect—control (absent here) existed. *See Sherrill v Wilson,* 653 SW2d 661, 666-667 (Mo 1983); *Payton v United States,* 679 F2d 475, 479-483 (5th Cir 1982); *see also, Purdy v Public Administrator of County of Westchester,* 72 NY2d 1, 1988 WL 53002 (1988) (operators of health care facility did not have enough "control" over conduct of voluntary patient to justify liability for tort committed by patient off the premises).

Finally, even if the Court were inclined to recognize a duty in the present context, we suggest that permitting a section 1983 cause of action would tend to convert this civil rights statute into a broadly-based federal tort remedy. While this Court has not yet spoken to the issue of constitutional tort liability couched in terms of recklessness or gross negligence (*see Daniels v Williams,* 474 US 327, 334 n 3 [1986]), it has consistently declined to transform section 1983 into a generalized federal tort law doctrine. *See Daniels,* 474 US at 329-332 (reiterating "abuse of power" doctrine as core-value of the due process clause; holding that mere negligence of sheriff's deputy leading to injury to prisoner was not a violation of due process); *Davidson v Cannon,* 474 US 344, 347-348 (1986) (negligent failure to protect one inmate from attack by another, even in the face of notice of a specific threat by an identified inmate to another identified inmate, was not actionable as a violation of due process); *Youngberg v Romeo,* 457 US 307, 317 (1982) (there is no generalized constitutional duty of government to furnish substantive services); *Baker v McCollan,* 443 US 137 (1979) (incarceration of wrong defendant, on account of negligently-caused misidentification, was not actionable); *Paul v Davis,* 424 US 693, 699-701 (1976) (circulation to

merchants of plaintiff's name and picture, on police list of "active shoplifters", even after such charges had been dismissed, amounted only to a state tort of defamation, not a violation of constitutional due process); *Martinez v California,* 444 US 277, 281, 283-285 (1980) (state statute conferring a defense to potential state tort law liability, which arguably resulted in negligent release of dangerous parolee, did not result in a deprivation of due process). As then-Justice (now Chief Justice) Rehnquist reasoned in *Baker,* 443 US at 146:

> "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as '[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,' *Estelle v Gamble,* 429 US 97, 106 (1976), false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official."

There simply is no sound basis for federalizing tort law. There is a jurisprudential problem of drawing the line for liability at an appropriate and workable boundary. As then-Judge (later Chief Judge) Breitel of the New York Court of Appeals stated:

> "Beyond practical difficulties there is a limit to attaining essential justice in this area. While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree."

Tobin v Grossman, 24 NY2d 609, 619, 301 NYS2d 554, 561, 249 NE2d 419, 424 (1969). Those observations are equally applicable here.

There are several practical problems that counsel against the recognition of liability on theories of gross negligence or recklessness. It would almost always be possible to state a cause of action on the pleadings. *Archie v City of Racine,* 847 F2d 1211, 1219 (7th Cir 1988) (en banc) (extensive review of cases, noting that no workable distinctions have yet been offered in this area, and concluding that "[a] line that cannot be policed is not a line worth drawing in constitutional law").

And, as history has demonstrated in the personal injury area, the recognition of a novel duty leads to further, expanded liability. Social services caseworkers are already being sued by parents who allege that child removal proceedings were commenced on flimsy or inadequate evidence. *See, e.g., In re Scott County Master Docket,* 672 F Supp at 1194, 1198-1199; *see also, Smith v Eley,* 675 F Supp 1301, 1303-1306 (D Utah 1987) (action by custodial parent against county sheriff and deputy for assisting former spouse in gaining physical custody of child). It is no exaggeration to suggest that every garden-variety matrimonial matter with a fight over child custody could become a federal lawsuit.

The possibilities of new avenues of federalized tort law are merely unleashed, and certainly not exhausted, by the family law area. Every other aspect of governmental services could become an inviting target for a federal lawsuit in the name of due process.

CONCLUSION.

The judgment should be affirmed.

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Respectfully submitted,

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